ARKANSAS SUPREME COURT

No. CR 05-1368

NOT DESIGNATED FOR PUBLICATION	**Opinion Delivered** **October 5, 2006**
GARY LEE WISE Appellant	*PRO SE* APPEAL FROM THE CIRCUIT COURT OF SALINE COUNTY, CR 2003-205, HON. GARY M. ARNOLD, JUDGE
v.	
STATE OF ARKANSAS Appellee	AFFIRMED

PER CURIAM

Gary Lee Wise was convicted by a jury of one count each of manufacture of a controlled substance (methamphetamine), possession of drug paraphernalia with intent to manufacture (methamphetamine), and simultaneous possession of drugs and a firearm.[1] He was sentenced to an aggregate term of 360 months' imprisonment and a fine of $5,000. The Arkansas Court of Appeals affirmed. *Wise v. State*, CACR 04-472 (Ark. App. March 2, 2005).

Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. Additionally, appellant filed motions for an evidentiary hearing, for appointment of counsel and to proceed *in forma pauperis*. The trial court denied the Rule 37.1 petition without a hearing, and denied appellant's motion for appointment of counsel. Appellant, proceeding *pro se*, has lodged an appeal here from the order.

[1]At trial, a charge of possession of pseudoephedrine with intent to manufacture (methamphetamine) was dismissed, and two counts of possession of a controlled substance were not prosecuted by the State. A charge of being a felon in possession of a firearm was severed. Appellant, although found guilty of this charge, did not include his conviction for this offense in his direct appeal or in the instant appeal.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

Initially, we consider the trial court's order denying appellant's *pro se* petition for Rule 37.1 postconviction relief. The trial court's order did not make written findings of fact and conclusions of law as required by Ark. R. Crim. P. 37.3(a). Without exception, we have held that this rule is mandatory and requires written findings. *Dulaney v. State,* 338 Ark. 548, 999 S.W.2d 181 (1999) (*per curiam*). If the trial court fails to make the required findings in accordance with the Rule, it is reversible error. *Morrison v. State,* 288 Ark. 636, 707 S.W.2d 323 (1986). For these reasons, the circuit court's order is clearly erroneous. If, however, the record before this court conclusively shows that the petition is without merit, we will affirm in the interest of judicial economy despite the trial court's failure to make written findings. *See Wooten v. State*, 338 Ark. 691, 1 S.W.3d 8 (1999).

The charges against appellant stemmed from a search of appellant's house in 2005. A neighbor had called the police to report that a truck driven by appellant blocked the neighbor's driveway. Police Officer Hayworth responded to the complaint. He knocked on the door of appellant's home and appellant's daughter, Hannah Ellison, answered the door. In response to Officer Hayworth's request to speak to appellant, Hannah stated that appellant was asleep, and the officer asked Hannah to wake him up. While waiting for appellant to come to the door, the officer noted a strong chemical odor coming from the house through the door that Hannah left open.

When appellant arrived at the front door, Officer Hayworth explained the neighbor's complaint, and asked if he could come in the house. Appellant consented to the officer's entry. In the house, Officer Hayworth noted items in plain view related to the use of methamphetamine and asked appellant if he could search the house. Appellant consented to the search. During the search, the officer spotted paraphernalia used for the manufacture of methamphetamine and shot gun shells. The officer then informed appellant of what he saw during the search and called for additional assistance.

When Corporal Burns from the Special Investigations Unit arrived, Officer Hayworth showed him the items the officer discovered. Corporal Burns then asked appellant if he could conduct a more thorough search than Officer Hayworth's. Appellant consented to this request. During the second search, Corporal Burns found additional drug paraphernalia items used in methamphetamine manufacture and a loaded 20-gauge shot gun hidden underneath the mattress in the master bedroom where appellant slept. Appellant then consented to the search of the truck that appellant borrowed from another person. More drug-related items were recovered from the truck.

Appellant was arrested and the items were seized by police. After being taken to the police station, appellant signed a written *Miranda* form. There, appellant stated that the items belonged to friends who had been at the house earlier in the day, but refused to identify the friends. Appellant admitted to the police that he was a methamphetamine addict and had intended to manufacture a single hit, or "bump," from the manufacturing remnants left at the house by appellant's friends, but that he was "not a cook."

In the instant matter, appellant argues the following points for reversal: (1) the trial court erred in failing to hold an evidentiary hearing on appellant's petition and in failing to appoint counsel

for appellant; (2) the trial court erred in denying appellant's *pro se* Rule 37.1 petition; (3) trial counsel rendered ineffective assistance of counsel by (a) failing to seek suppression of evidence obtained by police during a search of appellant's home in violation of appellant's Fourth Amendment rights, (b) failing to seek suppression of evidence based on the police's failure to inform appellant that he had a right to refuse consent to search his house, and (c) failing to investigate and call a witness to testify at trial.

On appeal, appellant first claims that the trial court erred by failing to conduct an evidentiary hearing on his Rule 37.1 petition. In his brief to this court, appellant complains that he was not provided a copy of "the complete records to prove facts" and admits that his records "are insufficient to prove facts to the Court" to support his Rule 37.1 petition. Appellant reasons that an evidentiary hearing would ensure that the complete facts would be presented and that appellant would then be provided records "to properly present his case to the Court for postconviction relief."

This court has recognized that the trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State,* 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders*, *supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.* Moreover, a Rule 37.1 hearing is not available to a petitioner in hopes of finding grounds for relief. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004), citing *Hayes v. State*, 280 Ark. 509, 660 S.W.2d 648 (1983) (*per curiam*).

After a thorough review of the instant case, we conclude that the record clearly reflects that

appellant's allegations in his Rule 37.1 petition were without merit, and thus he was not entitled to an evidentiary hearing. As appellant's petition has no merit, we find no basis to grant appellant's request for this court to reverse and remand the matter to the trial court for an evidentiary hearing, nor has appellant provided a valid basis to do so.

With regard to appellant's motion for appointment of counsel, postconviction matters, such as petitions pursuant to Rule 37.1, are considered civil in nature with respect to the right to counsel; there is no absolute right to appointment of counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (*per curiam*). Thus, we find no error in the trial court's denial of appellant's motion to appoint counsel to represent him in the Rule 37.1 matter.[2]

Next, appellant claims on appeal that the trial court erred in denying appellant's Rule 37.1 petition. In the instant appeal, appellant is limited to the arguments made on appeal that were also contained in his original *pro se* petition.

In his original petition, appellant argued that the police searched his home "without any permission whatsoever" and that appellant's failure to object to the entry of the police officer was not tantamount to giving consent to such entry. Appellant failed to raise these issues on direct appeal

[2]We note that in this section of the State's brief to this court, the State cites an unpublished decision by this court in support of a particular proposition. The State maintains that the prohibition against citing unpublished opinions does not apply to opinions from this court, referencing Ark. Sup. Ct. R. 5-2 "generally."

To the contrary, we have long held that "[a]n opinion which qualifies as one not designated for publication is written primarily for the parties and their attorneys. . . . Once again, *we state that nonpublished opinions will not be considered as authority and should not be cited to this court*." *Weatherford v. State*, 352 Ark. 324, 330-31, 101 S.W.3d 227, 232 (2003), quoting *Aaron v. Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982). (Emphasis ours.)

Moreover, in this particular instance, the legal proposition for which the State cites an unpublished opinion is not one found singularly in an unpublished opinion, as was the case in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000). Instead, myriad published cases standing for this particular proposition are available for the State to cite to this court, including a published case contained in the non-published case cited by the State.

and Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *See e.g. Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001). Appellant has not stated a valid basis for postconviction relief.

In his argument to this court, appellant also maintains that the officers obtained statements from appellant in his home without giving appellant his *Miranda* rights and that appellant was never informed of his right to refuse to give consent. These arguments were not contained in appellant's original petition. It is well settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State,* 334 Ark. 258, 975 S.W.2d 88 (1998).

Next, appellant argued in his original petition that trial counsel was ineffective for allowing the State Crime Lab witness' testimony about the "immeasurable" amount of methamphetamine, which appellant equates to no methamphetamine at all. Appellant did not argue this specific issue in the instant appeal and thus the issue was abandoned. *See Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

In his original petition, appellant also claimed that he was deprived of due process. On appeal, although appellant uses the phrase three times in different portions of his brief to this court, he failed to specifically set forth the essential due process at issue and the basis of the deprivation of this due process. Thus, appellant abandoned this claim on appeal. *Jordan*, *supra*.

The remaining issues appellant raised in his original *pro se* petition filed in the trial court that appellant also pursued on appeal revolve around appellant's contention that he received ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466

U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State,* 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the errors. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

On appeal, appellant contends that trial counsel rendered ineffective assistance by failing to seek suppression of the evidence obtained by police during a search of appellant's home in violation of appellant's Fourth Amendment rights. Appellant maintains that the search of his home was improper. As a result of the improper search, appellant argues that the evidence seized by police should have been suppressed, and would have been suppressed, by the trial court but for the ineffective assistance rendered by trial counsel.

Appellant's version of the search differs greatly from the account given by the police.[3] If trial counsel had filed a pre-trial motion to suppress, and appellant had testified to this version of the search, the trial court would not have been required to believe his testimony because he, as the accused, was the person most interested in the outcome of the proceedings. *See Flowers v. State*, 362 Ark. 193, ___ S.W.3d ___ (2005). Contrary to appellant's claim that credibility is not at issue in this matter, where there is conflicting testimony, the issue does become one of credibility to be

[3]Appellant alleges that Officer Hayworth used his foot to prevent appellant's daughter from closing the front door, essentially forcing his way into appellant's home. Further, appellant alleges that the officer accompanied Hannah to appellant's bedroom to awaken him, rather than waiting outside until appellant came to the door. Finally, appellant contends that Officer Hayworth did not seek consent to the search from appellant; instead, the officer informed appellant that he was entitled to search appellant's home as a result of seeing the drug paraphernalia in appellant's living room.

determined by the trial court. *Id.* Here, appellant entered a plea of guilty to the felony of first-degree sexual abuse in 1997, which gave rise to the felon-in-possession-of-a-firearm charge in the instant matter. Appellant's status as the defendant, his prior criminal history and his admission of being a methamphetamine addict would place appellant's credibility under suspicion and open up appellant and his story to cross-examination with regard to the credibility of his version of the police search of his home.

Thus, trial counsel's decision to not file a pre-trial motion to suppress may have been one based on consideration of the strength and credibility of appellant's version of the search. The record reflects that trial counsel did move to suppress any statements made by appellant at his home before being arrested and receiving his *Miranda* warning, indicating counsel's awareness of the facts related to appellant's arrest and potential suppression issues.[4]

Such matters of trial strategy and tactics, even if arguably improvident, fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel. *Noel*, *supra*. Additionally, trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra*; *Camargo, supra*. On this point, appellant has failed to prove that trial counsel's performance was deficient, or that the deficient performance prejudiced the defense.

Next, appellant contends on appeal that trial counsel was ineffective for failing to seek suppression of evidence based on the police's failure to inform appellant that he had a right to refuse consent to search his house. As noted above, appellant raises this issue for the first time on appeal.

[4]During the bench conference on the motion to suppress appellant's statements made at his home, trial counsel specifically stated that he would not argue that appellant's statements made at the police station should be suppressed as appellant had "filed a clear waiver."

Thus, we will not consider this argument. *Ayers, supra*.

Finally, appellant maintains that trial counsel was deficient by failing to investigate appellant's claim of illegal search and seizure, and by failing to call appellant's daughter, Hannah, as a witness to testify at trial. As to the former claim, appellant has failed to show that trial counsel did not adequately investigate his allegations of an illegal search and seizure. Although appellant limits his definition of an adequate investigation only to interviewing appellant's daughter, an adequate investigation sufficient to meet the standards of *Strickland* is not so limited and may include other forms of investigation. Here, trial counsel may have reviewed Corporal Burns' written statement outlining how he and Officer Hayworth conducted the search. Furthermore, *Strickland* does not require that every potential witness be interviewed in order for trial counsel to have adequately investigated a particular defense in a criminal case. Instead, *Strickland* requires the following:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, *counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91. (Emphasis supplied.) Different means of investigating the search and seizure were available to trial counsel other than interviewing appellant's daughter. Under these circumstances, we cannot say that trial counsel failed to conduct an adequate investigation of appellant's contention.

Further, as with her father's testimony, had Hannah testified at a suppression hearing, the trial court would not have been required to believe Hannah's testimony if called to describe the search conducted by police. At trial, Officer Hayworth testified that the police had been called to appellant's residence previously and that he had "dealt with her [Hannah] before." The trial court would have been free to give as much or as little weight to such testimony in deciding a motion to suppress as credibility of witnesses would have been within the purview of the trial court. *Flowers*, *supra*.

As a result, trial counsel's decision to not call Hannah as a witness may also have been one based on consideration of the probability of appellant's version of the search and Hannah's potential credibility as a witness. As stated above, matters of trial strategy and tactics are not grounds for a finding of ineffective assistance of counsel. *Noel*, *supra*. Further, trial counsel is not ineffective for failing to make meritless arguments. *Greene, supra*; *Camargo, supra*. On appellant's final point on appeal, he has failed to prove that trial counsel's performance was deficient, or that the deficient performance resulted in prejudice to appellant.

The record before this court conclusively shows that appellant's petition was without merit. Accordingly, we affirm the decision of the trial court.

Affirmed.